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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-1238

RAYMOND R. ROOP

Petitioner,

vs.

STATE OF ALASKA

Respondent.

RESPONSE OF THE STATE OF ALASKA TO THE PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALASKA THIRD JUDICIAL DISTRICT

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TABLE OF CONTENTS

	Page
Table of Authorities	i
Jurisdiction	1
Issues Presented for Review	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	7
Reasons for Denying the Writ	
A Breath Test Is A Search Incident to Arrest	11
Conclusion	15

TABLE OF AUTHORITIES

	Page
Cases	
Burnett v. Municipality of Anchorage, 678 P.2d 1364 (Alaska App. 1984)	12
Chimel v. California, 395 U.S. 752 (1969)	11
Cooksey v. State, 524 P.2d 1251 (Alaska 1974)	9
McCracken v. State, 685 P.2d 1275 (Alaska App. 1984)	9, 10
Schnekloth v. Bustamonte, 412 U.S. 218 (1973)	13

	Page
United States v. Mara, 410 U.S. 19 (1972)	13
Constitutional Provision	
United States Constitution, Art. I, §4	9, 10, 12, 13, 14, 15
Statutes	
Alaska Statute 28.35.031(a)	7, 9
Alaska Statute 28.35.032(a)	8, 11

JURISDICTION

Roop has properly invoked this Court's jurisdiction under 28 U.S.C. § 1257(3).

ISSUES PRESENTED FOR REVIEW

1. May a state require a motorist to submit to a chemical breath test for determining his blood alcohol level after the motorist has been lawfully arrested by a police officer for driving while intoxicated?

2. May a state penalize a defendant who has been lawfully arrested for drunk driving and then refuses to take a breath test?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment IV of the United States Constitution provides:

> Searches and seizures. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Alaska Statute 28.35.031(a) provides:

> A person who operates or drives a motor vehicle in this state or who operates an aircraft as defined in AS 28.35.030(g)(1) or who operates a watercraft as defined by AS 28.35.030(g)(2) shall be considered to have given consent to a chemical

test or tests of the person's breath for the purpose of determining the alcoholic content of the person's blood or breath if lawfully arrested for an offense arising out of acts alleged to have been committed while the person was operating or driving a motor vehicle or operating an aircraft or a watercraft while intoxicated. The test or tests shall be administered at the direction of a law enforcement officer who has reasonable grounds to believe that the person was operating or driving a motor vehicle or operating an aircraft or a watercraft in this state while intoxicated.

Alaska Statute 28.35.032(a) provides:

> If a person is under arrest for the crime of driving while intoxicated and that arrest results from an accident that causes death or physical injury to another person, a chemical test may be administered

without the consent of the person arrested to determine the amount of alcohol in that person's breath or blood.

STATEMENT OF THE CASE

At approximately 3:00 a.m. on October 1, 1983, an Alaska State Trooper observed Raymond Roop driving south on the Glenn Highway near Anchorage, Alaska. Trooper Goe noted that Roop's vehicle was weaving back and forth between the two southbound lanes of the Glenn Highway.

Trooper Goe stopped Roop's car, determined he was intoxicated, and arrested Roop for driving while intoxicated. AS 28.30.030. Roop was then taken to the Anchorage police station. There, pursuant to AS 28.30.031, he was asked to submit to an "intoximeter," a chemical breath test for measuring Roop's blood alcohol level. A standard warning form was read to Roop, informing him that sanctions, including loss of his driver's license, could be imposed for refusing to submit to the intoximeter. In addition, Roop was informed that refusal to submit to the intoximeter was a misdemeanor under Alaska law.

Despite these warnings, Roop refused to submit to the intoximeter. He consequently was charged, pursuant to Alaska Statute 28.35.032(a), with the misdemeanor offense of refusal to submit to a chemical breath test.

Roop moved to dismiss the complaint in the trial court, claiming that AS 28.35.032(a) was unconstitutional. Roop's motion was denied.

Roop ultimately pleaded nolo contendere to the charge on the condition that he be allowed to preserve his challenge to the constitutionality of AS 28.35.032(a). (This procedure is authorized by Cooksey v. State, 524 P.2d 1251 (Alaska 1974).) In his subsequent appeal to the Alaska court of appeals, Roop argued that it was unconstitutional for the state to criminalize his refusal to take a chemical breath test. Roop claimed:

1. A breath test is an unreasonable warrantless search;

2. If a breath test is a reasonable search under an "implied consent" theory, then the defendant must

have the right to peacefully withhold his consent to search;

3. It was therefore unconstitutional for the State of Alaska to impose criminal penalties for Roop's refusal to submit to a breath test, since the state was penalizing Roop's lawful assertion of his Fourth Amendment rights.

The Alaska court of appeals rejected all of Roop's arguments, relying on its prior decision in McCracken v. State, 685 P.2d 1275 (Alaska App. 1984). In McCracken, the court of appeals had addressed each of the constitutional arguments raised by Roop in his appeal. The court ruled in McCracken that, assuming a breath test is a "search", for Fourth Amendment purposes, the breath test is a reasonable search because it is a search incident to arrest. Under AS 28.35.031(a), no motorist need submit to a breath test unless he has first been lawfully arrested for driving while intoxicated. The court then ruled that, since a breath test is a search incident to arrest, a defendant has no Fourth Amendment right to refuse. It further

reasoned that since a motorist does not have a Fourth Amendment right to refuse a breath test, criminalizing the refusal to take a breath test does not penalize the motorist's assertion of Fourth Amendment rights. Finally, the Alaska court of appeals held that since the arrested motorist does not have a Fourth Amendment right to refuse the breath test, it follows that AS 28.35.032(a) does not condition the motorist's driving privilege on the requirement that he forfeit his Fourth Amendment rights. McCracken v. State, 685 P.2d at 1276-78.

Roop petitioned the Alaska supreme court for discretionary review of the decision of the court of appeals, relying on the same arguments he had raised to the court of appeals. The Alaska supreme court denied review, and Roop has now petitioned this Court for a writ of certiorari to review the decision of the Alaska court of appeals.

REASONS FOR DENYING THE WRIT

The police may require a defendant who has been arrested for driving while intoxicated to submit to a chemical breath test because, assuming arguendo that a chemical breath test is a search, it is a search incident to arrest.

A BREATH TEST IS A SEARCH INCIDENT TO ARREST

Alaska Statute 28.35.032(a) specifically provides that refusal to take a chemical breath test is a crime only if a motorist has been arrested for driving while intoxicated. Roop does not contest the fact that the state trooper had probable cause to arrest him for drunk driving, nor does he claim that his arrest was otherwise invalid. Under these circumstances, a breath test is a constitutionally permissible search for evidence of the crime of driving while intoxicated. Chimel v. California, 395 U.S. 752, 762 (1969).

Since a valid arrest is always a condition precedent to Alaska's requirement that a motorist submit to breathalyzer examination, the Fourth Amendment is not violated by such an examination. Indeed, Alaska law holds that if the motorist takes the breath test he does not lose his right to contest whether the officer had probable cause to arrest. If the defendant was illegally stopped or arrested, then his breath test results will be suppressed. Burnett v. Municipality of Anchorage, 678 P.2d 1364, 1370 (Alaska App. 1984).

Roop nevertheless argues that it is incorrect to characterize a breath test as a search incident to arrest because in order to conduct a scientifically valid test the police officer needs the cooperation of the motorist. (The motorist must blow somewhat forcefully into a tube.) Roop reasons that if a search cannot be effected without the cooperation of the arrestee, then the search is not a "search incident to arrest", but rather must be viewed as a "consensual search". Roop contends that

such a consensual search can only be justified if it fits within the guidelines of Schnekloth v. Bustamonte, 412 U.S. 218 (1973).

Roop's argument confuses the legal concept "consent" with the factual concept "cooperation" or "assent". Consent to search in the constitutional sense is only required where the person has a legal right to refuse. A legally arrested motorist has no Fourth Amendment right to refuse a breath test. Although a motorist may fail to cooperate when the arresting officer attempts to administer the breath test, the motorist's failure to cooperate does not create a legal right where it would otherwise not exist.

The instant case is analogous to federal cases where a defendant has refused to provide a handwriting exemplar upon a lawful state request. This Court has held that since the defendant has no right to withhold the exemplar, a defendant who refuses to provide a handwriting exemplar can be jailed for contempt of court. United States v. Mara, 410 U.S. 19 (1972). Similarly, an

arrested motorist like Roop has no right to refuse to take a breath test test, and he may be criminally penalized if he refuses to provide a sample of his breath for analysis.

Roop's assertion that criminalization of his refusal to take a breath test violates the equal protection clause of the United States Constitution, U.S. Const. Art. I, §14, rests on the premise that he has a Fourth Amendment right to refuse a breath test. Roop reasons that if he has a Fourth Amendment right to refuse a breath test, then he should be treated like all other citizens who lawfully assert their Fourth Amendment rights. Roop's argument fails because Roop did not have a Fourth Amendment right to refuse a breath test.

CONCLUSION

This Court should not issue a writ of certiorari in this case because it does not present any novel federal question of law. Each one of Roop's constitutional claims rests on an erroneous assumption that he had a Fourth Amendment right to refuse a breath test. Even assuming arguendo that a breath test is a search, it is a search incident to arrest.

RESPECTFULLY SUBMITTED this 21 day of March, 1985.

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